Miller (2)), 'each case must be dealt with and decided on its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony'."

Again, in *Qualcast (Wolverhampton) Ltd.* v. *Haynes*,(3) a case on employers' liability and negligence, Lord Keith of Avonholm said:—

"In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another."

The same views were expressed by Lord Somervell of Harrow, thus:—

"A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as 'law' and citable, the precedent system will die from a surfeit of authorities."

The learned judge was, therefore, quite right to consider the facts, instead of the so-called authorities, in coming to his decision.

Of the doctrine of *res ipsa loquitur* it may be useful to sum up as follows. First, it arises only in connection with the tort of negligence and does not apply where the cause of the accident is known: (see *Barkway* v. *South Wales Transport Co. Ltd.*(4)). Secondly, the *res* speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened. In other words, the circumstances are eloquent testimony *per se* of negligence. Thirdly, and conversely *res ipsa loquitur* cannot be relied on where the *res* is ambivalent. Fourthly, in criminal proceedings, where the heavier onus of proof rests on the prosecution and the facts proved must be sufficient to support the charge beyond reasonable doubt, the occasion can never arise where the facts require to be bolstered up by invocation of the doctrine. There is no mystique in the application of *res ipsa loquitur* to proof of negligence. As Diplock L.J. said in *Doughty* v. *Turner Manufacturing Co. Ltd.*:—(5)

"Thtre is no room today for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man."

To conclude, in the instant case, the appellant's statement in the police report, which was produced by the prosecution, attributed this accident to a cow or bullock suddenly crossing the road in the path of his vehicle. What had to be decided, therefore, was purely a question of fact, about which we say no more since the learned magistrate had been directed to call on the defence.

Question answered.

Solicitors: *Dharmananda & Co.*

NEW ZEALAND INSURANCE CO. LTD. v. SINNADORAI

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J., Abdul Aziz J.) January 27, 1969]

[Ipoh — Federal Court Civil Appeal No. X49 of 1968]

Arbitration — Insurance policy providing for arbitration — Stay of proceedings — Arbitration Ordinance, 1950, s. 5.

Insurance — Judgment obtained by passenger against insured — Liability of insurers to satisfy judgment — Whether the passenger bound by arbitration clause.

Road Traffic Ordinance, 1958, ss. 75, 80 and 81.

A motor vehicle driven by one Idris (hereinafter called "the insured") was involved in an accident. The insured died. The plaintiff/respondent who was a passenger in that vehicle sustained injuries. She obtained judgment against the estate of the insured and sought to enforce it against the defendants/appellants, who had issued a policy of insurance to the insured in respect of the user of his vehicle. Under the terms of the policy, the defendants/appellants undertook to cover the insured against claims by passengers with the usual provision for arbitration. The defendants applied for a stay of proceedings under section 5 of the Arbitration Ordinance, 1950. The High Court dismissed the application ([1968] 2 M.L.J. 70). The defendants appealed.

Held, allowing the appeal: (1) section 81(1) of the Road Traffic Ordinance is only applicable in cases where the question of the insured's insolvency arises. Where such a question does not arise the rights of a third party must be based on section 80(1). The respondent being a passenger in a private vehicle she was disentitled from relying on section 80(1) which only confers statutory benefits in cases where third party cover is made compulsory;

(2) since the respondent's only remedy was through subrogation she was bound by the arbitration clause, being a person "claiming through or under" the insured. The appellants accordingly were entitled to a stay of proceedings under the Arbitration Ordinance.

FEDERAL COURT.

P.P. Dharmananda for the appellants.

N. Sharma for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): Both parties to this appeal are dissatisfied with the judgment, delivered on June 12, 1968 by the High Court at Ipoh, dismissing an application, made by the appellants under section 5 of the Arbitration Ordinance 1950, to stay an action brought by the respondent claiming payment on a judgment which she looked to them to satisfy under the provisions of Part IV of the Road Traffic Ordinance, 1958.

The case history may be set out in a few words. The respondent was a passenger in a motor-car driven by one Idris (who was "the insured" under a policy then in force issued by the appellants covering third party risks) when an accident occurred resulting in death to Idris

himself and injury to the respondent. Having obtained judgment for $8,500 and costs against the insured's estate, the respondent claimed payment thereof from the appellants. Upon their repudiation of liability the respondent issued the writ on April 18, 1968, whereupon the appellants applied for a stay of all further proceedings under section 5 of the Arbitration Ordinance 1950. The application was dismissed with costs.

Although the point was never raised or argued, the decision of the learned judge turned solely on the meaning and effect of section 81(1) of the Road Traffic Ordinance, the relevant portion of which reads:—

"81. (1) Where under any policy issued for the purposes of this Part of this Ordinance a person (hereinafter called 'the insured') is insured against liabilities to third parties which he may incur then:—

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; . . . .

(b) ....

if either before or after that event any such liability as aforesaid is incurred by the insured his rights against the insurer under the policy in respect of the liability shall, notwithstanding anything in any written law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

His interpretation was as follows:—

"On a proper construction, the right of a passenger armed with a judgment against the insured can be exercised against the insurers only when the insured, not being a company, becomes a bankrupt or has made a composition or arrangement with his creditors. . . . It seems to me therefore that before the passenger can sue on the insured's policy of insurance, she has to take bankruptcy proceedings against the insured and that until she has done this, she has no rights under the policy, being a stranger to the contract. When she has taken such proceedings and an adjudication order has been made, then she becomes vested by statute with the rights of the insolvent insured. In such an event, the contractual provision for arbitration can be invoked. . . . It follows that the arbitration clause cannot be invoked until the insured has been made a bankrupt."

Counsel on both sides, however, are at one in that section 81(1) has no application. For the appellants, it was submitted that the real question which the learned judge should have considered, but failed to do, was whether the respondent is entitled to claim that, because she was not a party to the policy, she is not bound by the arbitration clause therein. That, of course, was the point in issue, since counsel for the respondent in the court below had contended that her claim rested on a statutory, rather than contractual, basis.

Dealing first with section 81(1), I am of opinion that the provisions thereof are merely a corollary to section 80 and cannot be construed *in vacuo*. Section 80(1) reads as follows:—

"80. (1) If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The marginal note describes it as the "duty of insurers to satisfy judgments against persons insured in respect of third party risks". This duty is, of course, a liability to indemnify the policyholder (including whomsoever may be insured by the policy) against judgments obtained by a third party. The third party in fact is in a better position than the insured himself because it is declared that "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy", the claim of the third party nevertheless prevails. The insurers are then left to their remedy of seeking recourse, if they can, against the insured for having paid out on his behalf what they claim to be contractually absolved from paying.

The insured's right to be *indemnified* is naturally a valuable *chose in action*. Where he is solvent no difficulty arises. But in case of his bankruptcy, the right should in the normal course vest in the official assignee, with the result of defeating the very object of third party insurance. The *raison d'etre* of section 81(1) is thus self-evident because, unless the third party is given a vested right by statute entitling him to direct recourse against the insurer, the judgment he obtained against the insured would only prove to be a paper judgment, of little or no value. This sub-section is further clarified by sub-section (2), (3) and (4).

It is in this context, then, that section 81 (1) must be viewed and construed. Its application is thus of limited scope. Consequently, where no question of the insured's insolvency arises, as in the instant case, the rights of a third party must be based on the provisions of section 80(1) since section 81 is wholly irrelevant. The learned judge, therefore, was in error in holding otherwise.

As section 80(1) refers specifically to "judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy)" the provisions of such

section necessarily assume first importance as a touchstone. The relevant portions of section 75 read as follows:—

"75. (1) In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

....

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle . . . . on a road:

Provided that such policy shall not be required to cover —

(i) ....

(ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise;"

In plain language this means that insurance cover is compulsory in respect of (a) *all third parties other than passengers* carried in the insured's vehicle and (b) *passengers* carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance. Up to this point there is no difference of opinion between counsel on both sides. The real conflict is on the interpretation of the bracketed words in section 80(1), "being a liability covered by the terms of the policy". Is such liability to be construed as synonymous and exegetical of "such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75"?

Counsel for the appellants contends for the affirmative answer on the ground that "being" means "it being the case of", so that only where third party cover is compulsory can the passenger avail himself of the provisions of sub-section (1) of section 80 to claim direct payment from the insurer. In other words, the passenger in a private vehicle (such as the respondent) is disentitled from relying on the statutory rights conferred by the sub-section on third parties generally, but has to seek his remedy, in the usual manner, through subrogation to the rights of the insured against the insurers. This, of course, has the effect of enabling the insurers to invoke the arbitration clause in the policy, which is binding on the insured and equally so on any injured third party "claiming through or under" the insured, so that a stay of proceedings may properly be sought under section 5 of the Arbitration Ordinance 1950.

On the other hand, counsel for the respondent submits, as stated in her notice of cross-appeal that:—

"The learned judge should have held that if the insurance company does in fact issue a policy of insurance covering liability to passengers, although it may not be required to do so by virtue of proviso (ii) to section 75(1)(b) of the Road Traffic Ordinance, the third party, irrespective of whether he or she is a passenger or not, becomes entitled in his or her own right to recover from the insurers. If a liability is covered by the terms of the policy the plaintiff as a person entitled to the benefit of the judgment is entitled to sue the defendant."

On this view, it is clear that the bracketed words result in extending the liability of insurers to make direct payment to third parties, beyond the scope of compulsory insurance, so as to include all others covered, even voluntarily, under the terms of the policy. As I understand it, counsel's argument is that those words should be construed, not as words of limitation — because then they would be wholly superfluous — but so as to give them a sensible meaning: *ut res magis valeat quam pereat.* Insurers having full freedom of contract, it is argued that they may insure passengers or not as they please: accordingly, where passengers are covered by the terms of the policy, there should be no valid reason why passengers voluntarily covered should be in a worse position than other passengers as to whom insurers have no option in giving cover.

This argument is attractive and almost irresistible. However, I am unable to read the word "being" as meaning "or" so as to extend the scope of the insurers' liability. The power to do so rests only with Parliament. The construction contended for, moreover, obliterates the distinction between the two broad categories of passengers in public service and private vehicles. In the result, proviso (ii) to section 75(1)(b) would be rendered nugatory, which fortifies my opinion that the respondent cannot avail herself of the provisions of section 80(1). This does not necessarily mean that the respondent, being compelled to proceed by way of subrogation, cannot achieve her ends. There is only the risk that defences valid against the insured may defeat her claim, although in the instant case I doubt whether an alleged breach of condition 3 of the policy by the insured will be sustainable. An insured who died in the accident can hardly be expected to "take all reasonable steps to safeguard the vehicle from loss or damage" or to see that the damaged vehicle was not left unattended and exposed to further risks.

To conclude, section 10(1) of the English Road Traffic Act 1934 is in *pari materia* with sub-section (1) of section 80 of our Road Traffic Ordinance 1958 and contains the same words of

limitation in brackets, "being a liability covered by the terms of the policy". The law as to the insurers' statutory obligation towards third parties is set out in paragraph 769 on page 375 of 22 *Halsbury* (3rd Ed.) as follows:—

"The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within the limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy."

Such being the case, it follows that the respondent's remedy must be sought through subrogation to the rights of the insured against the appellants, with the result that, where the policy contains an arbitration clause, the respondent as injured third party is bound by it as being a person "claiming through or under" the insured. The appellants accordingly should be entitled to a stay of proceedings under section 5 of the Arbitration Ordinance 1950. I would allow this appeal with costs here and in the court below.

Suffian F.J.: I have had the advantage of reading in advance the judgment of my Lord Chief Justice. I respectfully concur with his conclusion and reasons and have nothing to add.

Abdul Aziz J. concurred.

Appeal allowed.

Solicitors, *Dharmananda & Co.; N. Sharma.*

GAN KIM THYE v. THE UNION OMNIBUS CO., LTD.

[O.C.J. (Abdul Hamid J.) January 29, 1969]
[Seremban — Civil Suit No. 90 of 1967]

Damages — Personal injuries — Negligence — Breach of statutory duty — Bus conductor working more than a total of 80 hours a week — Employment Ordinance, 1955, ss. 58 and 59(1).

Master and Servant — Bus conductor working more than 48 hours a week — Whether breach of Employment Ordinance, 1955, s. 59.

This was a claim for damages for personal injuries sustained by the plaintiff who was employed as a bus conductor by the defendants. The plaintiff alleged that the injuries were caused by the negligence or alternatively by tht breach of statutory duty of the defendants, their servants or agents. This allegation was based on the fact that the plaintiff worked for more than six days in a week and a total of 80 hours a week in breach of sections 58 and 59(1) of the Employment Ordinance, 1955. As a result the plaintiff alleged that he had a stroke as a result of which he suffered paralysis of the left half of his body. The medical evidence was to the effect that the plaintiff suffered from a natural disease which had no relationship to his occupation.

Held: (1) there was no breach of any statutory duty on the part of the defendants or their servants or agents in this case but even if there had been a breach of statutory duty, the plaintiff had not proved that the injuries sustained by him were as a result of or caused by such breach;

(2) the plaintiff has failed to prove that the injuries sustained by him were caused by the negligence of the defendants.

Cases referred to:—

(1) *Bonnington Castings Ltd.* v. *Wardlaw* [1956] 1 All E.R. 615.

(2) *Golden Hope Rubber Estate Ltd.* v. *Muniammah & Ors.* [1965] 1 M.L.J. 5.

(3) *Crookall* v. *Vickers Armstrong Ltd.* [1955] 2 All E.R. 12.

(4) *Clarkson* v. *Modern Foundaries Ltd.* [1958] 2 All E.R. 33.

(5) *Nolan* v. *Dental Manufacturing Co. Ltd.* [1958] 2 All E.R. 449.

(6) *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 166.

(7) *Smith* v. *Baker & Sons* [1891] A.C. 325 at p. 362.

CIVIL SUIT.

Atma Singh Gill for the plaintiff.

N.A. Majoribanks for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: This is a claim for damages for personal injuries sustained by the plaintiff who was employed by the defendants as a bus-conductor. The plaintiff alleges that the injuries were caused by the negligence or alternatively by the breach of statutory duty of the defendants, their servants or agents. Briefly, the facts were that on 10th April, 1965 the plaintiff while at work had a stroke as a result of which he suffered paralysis of the left half of his body. The plaintiff, 46 years old, was employed by the defendants since 1947 and was paid $8 per day. As a bus-conductor he had to sell tickets to passengers; look after the safety of passengers when boarding on and alighting from the bus; account for the fares collected; keep and maintain records of the tickets sold and to load and unload, passengers' luggage, vegetable baskets and bicycles on the hood of the bus.

The plaintiff in paragraph 3 of the statement of claim alleges that he had to work from 6.30 a.m. to 6.00 p.m. without a day of rest in a week, a total of 80 hours a week in breach of section 58 of the Employment Ordinance, 1955. Counsel for the plaintiff contended that there was a breach of statutory duty on the part of the defendants and that it was as a result of this breach that the plaintiff suffered injuries. The learned counsel also submitted that by working more than 48 hours in a week there was also a breach of section 59 of the Employment Ordinance. Counsel for the defendants,